IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.380 OF 2007.

Mohan M. Shinde ...Appellant

Versus

Smt Pramila S. Powar & Ors. ...Respondents

Shri S.S.Patwardhan for the Appellant.

Shri Rahul P. Walvekar for the Respondent Nos.1 and 2.

CORAM : ABHAY S.OKA, J.
DATED : 10th December, 2007.

P.C.:

1. Heard learned counsel appearing for the appellant. The learned advocate for the appellant submits that following substantial question of law is involved in the present Second Appeal:

(i) Whether the learned Appellate Court is justified in relying on the judgment of the Kerala High Court reported in AIR 2006 Kerala Page 143. The learned Appellate Court ought to have seen that the issue that fell for the consideration of the Hon’ble Kerala High Court was whether a suit for partition at the instance of a daughter of the deceased could be defeated by invoking section 23 of the Hindu Succession Act, 1956 by the legal representatives of the deceased son of

the intestate and whether the deletion of section 23 of the Hindu Succession Act by the Amendment Act 2005 would affect pending suits for partition?

2. The Appellate Court while dealing with this aspect has observed as under:

"The omission of section 23 by the Hindu Succession (Amendment) Act, 2005 which has come into effect from 9.9.2005 has given a defeat to the right of the male heir to claim the benefit of the earlier protection and even it is applicable now to the pending suits and appeals also. Therefore, the plaintiff is bound to succeed in this appeal".

3. The learned counsel for the respondent invited my attention to a decision of the Division Bench of this Court in the case of Smt Kaushalyabai Biharilal Pateriya Vs. Hiralal Bhagwandas Gupta (2007 (2) ALL MR Page 679). In paragraph No.18 of the said decision, the Division Bench has held thus:

"We, therefore, hold that deletion of section 23 from the Hindu Succession Act, 1956 though has

> taken place during the pendency of the present appeal, its effect will have to be taken into consideration while deciding the present appeal and consequently we hold that as a result of such omission the plaintiffs are entitled to share in the dwelling houses[S] also and consequently the shares of the plaintiffs in the dwelling house[S] would be to the extent of 1/30th each. We, therefore, do not agree with the learned counsel for the respondents that the provisions Amending Act No.39 of 2005 would not apply prospectively, as such not to the present appeal".

4. The submission of the learned counsel for the appellant is that several legal aspects have not been brought to the notice of the Division Bench while the Division Bench decided the aforesaid case of Smt Kaushalya Biharilal Pateriya (supra).

5. This Court is bound by what has been held by the Division Bench of this Court which is quoted above.

6. In view of what has been held by the Division Bench, no substantial question of law arises and Second Appeal is accordingly dismissed.

JUDGE